United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2180

To be argued by
JEFFREY S. COOK

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Plaintiff,

against

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JENNINGS, IRVING GEIST, KENNETH DEMBSKI, ROYAL S. MARKS, SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR., ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT, JR.,
Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH, and HELGA RUTH JENNINGS,
Defendants-Appellees,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt,
Intervenor-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE'S BRIEF

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ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

Counter Statement of Case

This is an interpleader action pursuant to 28 U.S.C.A. § 1335 commenced by the Massachusetts Mutual Life Insurance Company (hereinafter "Mass. Mutual") against

fourteen conflicting claimants to a fund of $144,382.22 on deposit in the Registry of the District Court for the Southern District of New York (A. 15a). Plaintiff thereafter deposited further sums with the Registry of the District Court representing the proceeds of renewal commissions through January 1, 1973 of one of plaintiff's former employees, Lawrence E. Simon, a defendant herein, and "floor plan payments" credited to said defendant Lawrence E. Simon's account with plaintiff as of January 1, 1973. Both the renewal commissions and floor plan payments have accrued and will accrue after such date and have also been made the subject of this action (A. 90a).

The appellant Trustee in Bankruptcy (hereinafter "Trustee") of Simon moved for leave to intervene on the eve of a joint motion for summary judgment made by the defendants Third National Bank of Hampden County (hereinafter "Third National" or "Bank") and Dasha Auerbach Stuart, Executrix (hereinafter "Stuart") and was granted such right by the District Court (A. 74a-76a, 90a). The issues were tried before the Honorable Marvin E. Frankel, United States District Judge for the Southern District of New York, on April 26th and 27th, 1973, and thereafter referred to the Honorable Gerard L. Goettel to hear and report as Special Master. After a hearing and the submission of evidence before the Special Master on September 21 and 25, 1973, the Special Master pursuant to Rule 53(e)(5), made a report under date of January 30, 1974 (A. 90a-120a). Further hearings were held before the Special Master and a supplemental report dated March 11, 1974 was filed with, and made a part of, the Special Master's report of January 30, 1974 (A. 126a-131a).

The decision of Judge Frankel of July 3, 1974 adopted the findings of fact and conclusions of law as set forth in the Special Master's report (A. 166a-168a). The claim of the Third National to the renewal commissions of the bankrupt Simon was upheld in full with the exception of an $8,400 loan in December, 1967.

Final judgment was entered on July 31, 1974 (A. 169a-170a) and ordered the payment to Third National of $87,050.97 out of the sum of $144,382.22 then in the Registry of the Court, $70,711.20 to Third National from the monies held in escrow by plaintiff Mass. Mutual prior to January 1, 1973, and the payment by Mass. Mutual out of any renewal commissions which have accrued to the account of Simon since January 1, 1973 computed as $144,335.45 plus interest at the rate of 6½% from May 12, 1970 to date of payment less the $157,762.17 paid to Third National as described above.

Counter Statement of Facts

On July 31, 1932 Simon executed and delivered to Mass. Mutual in Springfield, Massachusetts, a General Agent's Agreement (A. 22a, 78a, 91a), which entitled him to receive commissions not only on initial premiums for policies which he sold but also on any renewal premiums paid on such policies at stipulated percentages. Such renewal commissions are, of course, only payable if, as and when renewal premiums are received by Mass. Mutual from its policy holders.

On or about November 10, 1938, Simon signed an assignment of said renewal commissions which was approved and assented to by Mass. Mutual in Springfield, Massachusetts, and thereafter delivered to Third National at its home office in Springfield, Massachusetts (A. 25a, 78a, 92a). This assignment applies, by its terms, to all renewal commissions payable to Simon under and in connection with his contract with Mass. Mutual.

On or about March 29, 1967, Simon defaulted in making payment to Third National of the indebtedness referred to in the assignment and Third National gave notice of said default to Mass. Mutual and Simon and thereafter Mass. Mutual made payments to Third National pursuant to the

terms of the assignment until January 4, 1968 (A. 79a, 93a).

On or about the latter date, Mass. Mutual was served with a subpoena and restraining notice by judgment creditor Irving Geist (A. 79a, 93a).

The contract between Simon and Mass. Mutual was terminated on December 31, 1962 and on September 16, 1964 the parties entered into another agreement (A. 27a) which provided for certain additional payments to Simon. Simon's assignment to Third National does not affect in any way the payments due under the subsequent contract nor does it affect initial commissions. It affects only renewal commissions under and in connection with the 1932 employment contract (A. 92a).

The sum of $144,382.22 originally deposited with the District Court by Mass. Mutual upon the commencement of this action consisted of $95,014.21 representing renewal commissions payable to Simon under the General Agent's Agreement with Mass. Mutual and $48,971.26 representing floor plan payments (A. 79a). In addition, Mass. Mutual held in escrow between the initiation of the action and prior to January 1, 1973 $70,711.20 in renewal commissions and $82,495.47 in floor plan payments (A. 84a). As above mentioned, additional sums consisting of renewal commissions and floor plan payments have accrued since January 1, 1973 and will so continue to accrue and be subject to the jurisdiction of the District Court (A. 90a).

During the period from and after Simon's execution and delivery of his assignment to Third National in Springfield, Massachusetts, in 1938, Third National made various loans to Simon from time to time and during such period Simon made repayments of part but not all thereof from time to time with the result that on May 12, 1970 when Mass. Mutual filed its complaint commencing this action, Simon owed Third National $132,055.20 plus interest of

$20,680.25, making a total of $152,735.45 (A. 82a, 93a). Since said date interest has been accruing on the aforesaid unpaid principal amount at the rate of $24.16 per day (T. 173).*

Simon's records of renewal commissions were kept in two places—Massachusetts and New York (A. 91a, 133a). His records with respect to his indebtedness to the Third National under the assignment were maintained at the Mass. Mutual's home office in Springfield, Massachusetts (A. 140a, 141a), as were his records concerning renewal premiums collected by Mass. Mutual on policies originally sold by Simon and his subagents and the renewal commissions therefrom credited to his account (A. 91a, 92a).

On February 20 and 25, 1970, in an excess of caution, Third National filed in the New York City Register's Office and in the Office of the Department of State of the State of New York, UCC-1 Forms not signed by Simon (A. 81a, 94a, 159a). On March 11 and March 16, 1970, Third National filed in said offices UCC-1 Forms signed by Simon. On March 12 and 13, 1970, Third National filed UCC-1 Forms in the City Clerk's Office in Springfield, Massachusetts and in the Office of the Secretary of State of the State of Massachusetts signed by Simon (A. 81a, 94a, 159a).

Simon signed the former UCC-1 Form with the advice of his then counsel and in June, 1970, again with the advice of counsel, he acknowledged in writing the amount of his indebtedness to Third National (A. 135a-139a).

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* "T." refers to the transcript of proceedings before Magistrate Goettel. "R" is used to refer to the record made before Judge Frankel.

ARGUMENT

POINT I

The substantive law of Massachusetts, as the Court below correctly held, is the applicable and governing law with respect to the validity and effect of Third National Bank's security interest under any approach.

The Court below held, after expressing some doubt that the Uniform Commercial Code was applicable at all to the question of the validity and perfection of the Bank's security interest, that Section 9-103 of the New York Uniform Commercial Code (hereinafter "U.C.C.") governed the choice of law question herein (A. 166a). Section 9-103(1) provides as follows:

> "(1) If the office where the assignor of accounts or contract rights kept his records concerning them is in this state, then the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located."

Finding that U.C.C. § 9-103(1) was the governing provision, both the Court and the Special Master concluded that Massachusetts law controlled. This conclusion was based upon what the Court termed "the Magistrate's meticulous analysis on this point" and finding that the "pertinent records at the pertinent time were in Massachuetts" (A. 167a). The Magistrate's finding that the pertinent records of the assignor Simon were kept in Massachusetts and that Massachusetts law accordingly governed was made after two separate evidentiary hearings.

The evidence fails to support the Trustee's contention, at Point II of his brief on appeal, that the law of New York and specifically the New York U.C.C. applies with respect

to the Bank's security interest. By the bankrupt Simon's own admission, his records were kept "in two places. In my office at 320 Park Avenue and also at the home office of the Massachusetts Mutual, Springfield, Massachusetts" (A. 133a). When questioned about the confession of judgment which Simon gave to the Third National Bank and asked about records to substantiate the information contained therein concerning his indebtedness to the Bank, he admitted that "the only copies I have that relate to my indebtedness for the Bank are primarily letters from Mr. Bunten who would periodically write me and tell me what the balance was that I owed them or how much money the Massachusetts Mutual was holding in escrow" (A. 140a). Simon clearly maintained no records in New York pertaining to the premium receipts and commissions which he might anticipate and had to rely solely on what Mr. Bunten's (Mass. Mutual's) records in the Springfield office showed.

The Special Master specifically found that the records with respect to the payments of renewal premiums on policies originally sold by Simon and his sub-agents, and as to which renewal commissions therefore became due under his contracts, were maintained by the company *in Springfield, Massachusetts* (A. 91a-92a).

As the Special Master concluded (A. 104a):

> "When dealing with renewal commissions (as contrasted with initial commissions), the pertinent records are those kept in Massachusetts concerning the receipt by the company of the renewal premium and the crediting of the commission to Simon's account. (Simon's contract did not call for him to collect renewal premiums.) From Simon's own records all he could tell was that he had sold a policy and that a renewal premium was *due* on a given anniversary date. The operable act which vested the commission, the receipt of the premium by the company in Massachusetts, is not reflected in Simon's records. While the Trustee

> contends that Gilmore, Vol. 1, *Security Interests In Personal Property*, § 10.9, p. 321, supports his position, the example given (which the Trustee concedes is 'precisely the situation in the instant case' (Trustee's Supplemental Trial Memorandum, p. 32) would make Massachusetts the filing state * * *."

Nevertheless, the Trustee sought and obtained permission for further argument and a supplemental hearing before the Magistrate with respect to this and certain other questions (A. 121a-123a). The Trustee challenged the correctness of the Magistrate's "clear inference" concerning the absence in New York of any records showing renewal premium payments to the insurance company in Massachusetts, but in the words of the Magistrate

> "he has been unable to provide any evidence to the contrary. He was offered the opportunity to reopen the proceedings for presentation of additional evidence in the event he could represent to the Court that he had evidence establishing this fact. He has not made such an application, and the time for making it has expired." (A. 127a)

It is particularly significant that the Magistrate reemphasized the fact that Simon, when asked which records he kept in New York, "listed a number of types of records and did not mention records concerning renewal premiums" (A. 126a). The renewal premiums were not collected by Simon, but were submitted directly by policy owners to the company in Massachusetts, and the company thereafter periodically sent renewal commissions, based upon renewal premiums received, to Simon (A. 126a). As the Special Master again found, and the Trustee failed to refute with any evidence or even the representation that such evidence existed,

> "The inference is clear that Simon's records did not contain the details concerning the receipt by the com-

pany of the renewal premiums, but would only reflect his receipt of renewal commissions during the period that he was receiving them." (A. 126a)

A judge's findings must stand unless "clearly erroneous", F.R.C.P. 52(a), and this rule applies to factual inferences from undisputed basic facts. See *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291-292 (1960).

The Trustee's entire argument for the proposition that New York law governs herein is based upon the contention that Simon's records were maintained in New York, and that under U.C.C. § 9-103(1) New York law accordingly applies. As shown above, however, this contention of the Trustee is contrary to the overwhelming evidence and the lower Court's findings of fact and conclusions of law therefrom.

In any event, Massachuetts law would appear to control "under any approach" (A. 101a)—that is, whether the U.C.C. and its choice of law test (§ 9-103) *is* applied (as it was by both the Magistrate and Judge Frankel) or whether general conflicts of law rules are consulted.

A Court should in the first instance look to the law of contracts as a whole to determine what law applies rather than assume that a particular statute such as the U.C.C. is applicable because as is true in the case at bar the U.C.C. conflicts test (§ 9-103) would never be applicable if the U.C.C. itself is inapplicable. The Massachusetts U.C.C. was not enacted until 1958, some twenty years after the assignment was signed and delivered to Third National Bank, hence was clearly inapplicable when the same was made. Massachusetts specifically did not make its Code applicable to prior security interests such as the one at bar but rather exempted them as follows (§ 19 of Chapter 765 of the Acts of the General Court of 1957 of Massachusetts):

"Transactions validly entered into before the effective date of this Act and the rights, duties and in-

terest flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred."

The secured transactions article of the New York U.C.C. does not apply to a security interest taken in renewal commissions. Section 9-104 of the U.C.C. lists a number of transactions to which Article 9 does not apply, one of which is

"A transfer of a claim for wages, salary, or other compensation of an employee." Subsection (d).

The reason for the exclusion of such transfers from the operation of Article 9 is provided in Official Comment 4 of the Code:

"In many states assignments of wage claims and the like are regulated by statute. Such assignments present important social problems whose solution should be a matter of local regulation. Paragraph (d) therefore excludes them from this Article."

New York has chosen to regulate by statute (Personal Property Law §§ 46 et seq.) the assignment of renewal commissions. The New York Annotations to U.C.C. § 9-104 refer to Personal Property Law §§ 46-49 (regulating assignments of future earnings) as one of the New York statutes which "would be unaffected by the Code." Although that statute provides for filing in some cases, no filing is required where (as here) the amount of the loan exceeds $1,000. Personal Property Law § 46-c. Moreover, the filing provisions do not apply to the assignment herein for the reason that the assignment was made prior to the effective date of the filing provisions of the statute and such provisions apply prospectively only. *Marcomo Stevedoring Corp.* v. *Nathanson,* 108 N.Y.S. 2d 789 (Supreme

Court, Queens County, 1951); *In Re Lott*, 49 N.Y.S. 2d 134 (Supreme Court, Delaware County, 1944).

Magistrate Goettel correctly held that, even if New York's law was applied for all purposes, its U.C.C. would not apply to an assignment of renewal commissions (A. 106a). The Magistrate cited the provision of U.C.C. 9-104(d) that Article 9 does not apply to "a transfer of a claim for wages, salary or other compensation of an employee", and ruled that New York's Personal Property Law, § 46-49, which does not require filing under the facts of this case, would apply (A. 106a). Since an insurance agent who works for only one company (as did Simon) is an "employee" for certain purposes (e.g. Workman's Compensation) *Gordon* v. *New York Life Ins. Co.*, 300 N.Y. 652 (1950), the Magistrate found that

> "The assignment is identical in most considerations to an assignment of an employee's compensation (such as profit sharing plans or other contingent future earnings)." (A. 106a)

The Magistrate also found that the assignment of renewal commissions was similar to an assignment of wages by reason of the fact that notice of the assignment was given to Mass. Mutual from whom the payments were due (as is also required by New York's Personal Property Law, § 46) (A. 102a).

Although the Court expressed some "reservations" about the Magistrate's alternative holding that U.C.C. Article 9 would be inapplicable to renewal commissions because these are to be treated as "wages, salary or other compensation of an employee" under § 9-104(d), the Court did state that "the essential policy purposes of the § 9-104(d) exclusion might readily be deemed pertinent" (A. 168a).

Thus, it would appear that since the U.C.C. itself does not apply to the assignment of renewal commissions herein, the U.C.C. choice of law provision (§ 9-103) is *a fortiori*

also inapplicable. In this event, Massachusetts law would also govern (as it does under the otherwise inapplicable § 9-103) whether the traditional *lex loci contractus* rule or the more modern "most significant contacts" or "center of gravity" test were to be applied herein by the New York courts.

In determining the governing body of law with respect to the validity and effect of a contract, the New York courts have traditionally looked to the state in which the contract was made. *Barry* v. *Equitable Life Assurance Society,* 59 N.Y. 587 (1875); *Swift & Co.* v. *Bankers Trust Co.,* 280 N.Y. 135 (1939); *Union National Bank* v. *Chapman,* 169 N.Y. 538 (1902). The New York state courts consider the state in which the last act necessary to make the assignment a binding contract took place as the state where the contract was made. See *Huber* v. *D'Estane,* 180 App. Div. 220 (2nd Dept. 1917); *Fremay, Inc.* v. *Modern Plastic Machinery Corp.,* 15 A.D. 2d 235 (1st Dept. 1961); *Walton School of Commerce* v. *Gross,* 181 Misc. 720, aff'd 292 N.Y. 601 (1943); *Denihan* v. *Finn Iffland Co.,* 143 Misc. 525 (Municipal Court of New York, 1932). The law in Massachusetts is the same. See *Thomas G. Jewett, Jr., Inc.* v. *Keystone Driller Co.,* 282 Mass. 469, 475, 185 N.E. 369 (1932); *Clark* v. *State Street Trust Co.,* 270 Mass. 140 at page 150, 169 N.E. 897 (1930); *Milliken* v. *Pratt,* 125 Mass. 374, 376 (1878); *Pearsall* v. *John Hancock Mutual Life Ins. Co.,* 321 Mass. 361 at pages 363-64, 73 N.E. 2d 612 (1947).

In the case at bar, the Trustee stipulated at trial that the loan agreement was transacted in Massachusetts (A. 138a) and the Magistrate made such a finding of fact (A. 92a, 99a-100a). Hence, Massachusetts' substantive law governs with respect to the validity and effect of the assignment of renewal commissions herein under traditional choice of law rules, that state being the state in which the last act necessary to make the said assignment a binding

contract took place. See also *Mogul* v. *Jenkins Bros.*, 203 Misc. 635 (Sup. Ct., Appellate Term, 1935), holding that

> "The question of whether or not a contract is assignable is controlled by the law of the place where the contract is made and is to be performed whereas the question on the validity of a transfer of a claim which is capable of assignment is governed by the law of the place where the assignment is made."

Massachusetts substantive law would still govern if this Court should determine that the "center of gravity test", sometimes termed "the most significant contacts test", is the choice of law test which would be applied by a New York court with respect to the validity and effect of the assignment of renewal commissions herein (A. 100a).

It can hardly be disputed (and the Trustee does not in his brief dispute) that Massachusetts has the most significant contacts with the security interest in Simon's renewal commissions assigned over to Third National. The Magistrate found that Simon's agency contract was made in Massachusetts, that the loans were made in Massachusetts, the security assignment was made from a Massachusetts insurance company to a Massachusetts bank, the renewal commissions were received in Massachusetts and credited to Simon's account there, and that payments were made directly (for a time) from the Massachusetts insurance company to the Massachusetts bank (A. 100a). From these operable facts, the Magistrate, citing *Auten* v. *Auten*, 308 N.Y. 155 (1954), *Downs* v. *American Mutual Liability Insurance Co.*, 14 N.Y. 2d 266 (1964), and *Matter of Havemeyer*, 17 N.Y. 2d 216 (1966), concluded that

> "It would appear, therefore, that the parties contemplated Massachusetts law as governing and that, in any event, Massachusetts has the most significant contacts with the filing of the security interest in the renewal commissions." (A. 100a)

That the intentions of the parties are determinative as to the governing law in choice of law considerations is well settled. As is stated at 8 N.Y. Jurisprudence, at page 437

> "The general rules as to what law governs a contract are subordinate to the primary canon of construction which requires that where it can be ascertained the intention of the parties shall govern." Citing *A.S. Rampell, Inc.* v. *Hyster Co.*, 3 N.Y. 2d 369 (1957); *Compania De Inversiones Internacionales* v. *Industrial Mortgage Bank*, 269 N.Y. 22 (1935), cert. denied, 297 U.S. 705; *Wilson* v. *Lewiston Mill Co.*, 150 N.Y. 314 (1896).

Where the parties have not expressed themselves regarding the law that shall determine the extent of their rights and duties under the contract, their intentions may appear from the terms of the contract "in the light of surrounding circumstances." *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft,* 182 Misc. 776, 45 N.Y.S. 2d 882 (Supreme Court, New York County 1943). Indeed, it has been held that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a contrary intention. *Union National Bank, supra.*

The parties herein clearly contracted in both instances in 1932 and 1938 with Massachuetts substantive law in mind. They intended that Massachusetts law, as the place of both contracts, the loans and the security would control in any future construction or interpretation of these contracts. That the implied expectations of the parties is a most significant contact, if not *the* most significant contact, with respect to the validity and effect of contracts, is clear. *Matter of Havemeyer, supra.*

Thus, under any approach, the substantive law of Massa-

chusetts controls with respect to the validity and effect of Third National Bank's security interest in the assignment of renewal commissions.

POINT II

The assignment to Third National Bank by Simon of his rights in future renewal commissions is valid under Massachusetts law. Since the assignment was executed prior to the adoption of the Uniform Commercial Code in said State, no filing or other acts of public recording were necessary to perfect the security interest thereby created.

The Magistrate properly held that assignments of renewal commissions have been found valid and enforceable contracts under New York as well as Massachusetts law (A. 98a, 101a), citing *Davidson* v. *Massachusetts Mutual Life Insurance Co.*, 81 N.Y.S. 2d 835 (New York, 1948); *Rockmore* v. *Lehman*, 129 F. 2d 892 (2d Cir. 1942); *Couch on Insurance* 2d, ¶ 26:395; *Claycraft Co.* v. *John Bowen Co.*, 287 Mass. 255, 191 N.E. 403 (1934); *Commercial Casualty Ins. Co.* v. *Murphy*, 282 Mass. 100, 184 N.E. 434 (1933); *Great American Indemnity Co.* v. *Allied Freightways, Inc.*, 325 Mass. 568, 91 N.E. 2d 823 (1950). In addition to the authorities cited by the Magistrate, other Courts have held that such renewal commissions are freely assignable and transferable non-exempt contract rights and clearly valid and enforceable contracts. See *Citizens Loan Association* v. *Boston and Maine R.R.*, 196 Mass. 528, 82 N.E. 696 (1907); *Mutual Trust Life Insurance Co.* v. *Wemyss*, 309 F. Supp. 1221 (D. Me. 1970); *In Re Fahys*, 18 F. Supp. 529 (S.D.N.Y. 1937); *In re Wright*, 157 F. 544 (2d Cir. 1907); *In Re Keller's Will*, 86 N.Y.S. 2d 315 (West. Surr. 1948); *Continental Purchasing Co.* v. *Van Raalte*, 251 App. Div. 151, 295 N.Y.S. 867 (4th Dept. 1937).

In the *Claycraft Co.* case, *supra,* relied upon by the Magistrate, the Massachusetts Supreme Court stated (at pp. 258-259):

> "In this Commonwealth it has never been held necessary to the validity of an assignment of money to become due in the future, that there be a binding contract under which the assignor may insist that money shall become due. It is sufficient that there is an existing engagement out of which it is expected that money will become due."

and held that the assignment of monies expected to be earned from the future sale of bricks to a specific contractor was good as against a later assignment for the benefit of creditors, and "no notice or record was necessary."

In the *Citizens Loan* case, *supra,* the Massachusetts Supreme Court upheld as valid an assignment of monies expected to become due out of an arrangement which was something less than a binding bilateral contract. In that case there was an assignment of future earnings which might accrue under an existing contract of employment as a conductor even though the term and compensation of the contract was indefinite.

In the *Great American Indemnity Co.* case, *supra,* also cited by the Magistrate, an interstate carrier contracted to sell its operating permit and then assigned all of its right to payment under this contract. Notwithstanding that nothing was due under the purchase contract at the time of assignment since the permit transfer had yet to be approved by the I.C.C., the assignee prevailed over a receiver of the carrier and again there appeared to have been no notice requirement.

Nevertheless, the appellant Trustee argues at Point I of his brief that the assignment of renewal commissions is invalid under the case of *Taylor* v. *Barton Child Company,* 228 Mass. 126, 117 N.E. 43 (1917). This same argument

was made and soundly rejected below. The *Taylor* case and other Massachusetts cases upon which the Trustee relies for the contention that the assignment of renewal commissions without recording is invalid as a "secret lien" all concerned accounts receivable. As the Magistrate noted, Massachusetts law "has always been" that an assignment of money to become due in the future under a contract is a valid and p[illegible]fected instrument *without notice or recording* "with the exception of accounts to be received in the future" (A. 101a). Since the renewal commissions involved in the case at bar were specifically found to be "much more in the nature of a contract right than an account receivable" (A. 101a), which the Trustee acknowledged below and still acknowledges upon this appeal (see page 11 of Trustee's brief wherein it is stated that "Third National's security interest covered a 'contract right' as that term is defined in § 9-106 of the Code"), the *Taylor* case and other authorities relied upon by the Trustee are plainly inapposite herein.

It should be noted that the Court in *Claycraft, supra,* specifically distinguished the *Taylor* case, restricting such case to accounts receivable, in the following language (at p. 259):

> "The present case differs from . . . *Taylor* v. *Barton Child Co.,* 228 Mass. 126, where an assignment of accounts receivable which might result from unknown future transactions with persons generally, was held invalid . . ."

Moreover, and as the Magistrate correctly recognized (A. 101a), there is even some question as to whether the *Taylor* case is still applicable in Massachusetts since the enactment of Chapter 107(A) of the Massachusetts General Law in 1945 which deals with the assignment of accounts receivable.

The assignment in 1938 is unquestionably valid under Massachusetts law and created in Third National a per-

fected security interest simultaneously and automatically upon execution of the same. As shown above (and as the Court below held), no notice or recording was needed to effect perfection of Third National's security interest in Simon's contract rights to future renewal commissions.

The fact that Third National never took possession of the funds and that a trustee in bankruptcy was not a party to the authorities cited by the Magistrate in his report is clearly of no relevance and does not change the well established Massachusetts rule. Third National could hardly have taken possession of its security interest in the renewal commissions prior to Simon's default in the making of payments under the assignment. Moreover, the U.C.C. (while inapplicable to renewal commissions specifically) recognizes the inability of a security creditor to perfect his interest in contract rights such as renewal commissions by the taking of possession. As the Official Comment to U.C.C. § 9-302 states,

> "§ 9-305 * * * excludes accounts and contract rights from the types of collateral which may be the subject of a possessory security interest."

The following language of the Supreme Court of Massachusetts in *Citizens Loan Association* v. *Boston and Maine Railroad, supra,* is especially apposite:

> "An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. * * * Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. *It constitutes a present, existing, right of property,*

> *which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession.* The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. Wasserman v. McDonnell, 190 Mass. 326, 76 N.E. 959. *The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part*" 82 N.E. at 697. (Emphasis added)

And as the Court stated at page 698,

> "It may be taken for granted that *the right to future wages* to be earned under such a contract *does not pass to the trustee in bankruptcy.*" (Emphasis added).

The complete lack of merit to the Trustee's argument that the assignment of renewal commissions herein is invalid can also be seen from the holding of the Massachusetts Supreme Court in *Commercial Casualty Ins. Co., supra.* There a contractor's assignment of the retained percentages to his bonding company as collateral security for his performance bond was held valid against a creditor who later attached these funds (by trustee process) in the hands of the owner at a point when the monies were due and owing by the owner because the work had been accepted. As the Court stated at 282 Mass. 104:

> "In this Commonwealth a prior assignee for value prevails over a subsequent attaching creditor who attempts by trustee process to attach the funds in the hands of the debtor, even though no notice of the assignment has been given to the trustee debtor prior to the attachment."

Parenthetically, it might be noted that the general and New York rule is not to the contrary:

> "Where the assignor has present property in the future property he now assigns, the general and New York rule [citing, among other statutes, Personal Property Law § 46 et seq.] is that the assignment is perfected as against third parties when it is made." 43 Cornell Law Quarterly 289, at 292 (1957).

In *Rockmore* v. *Lehman, supra,* this Court rejected the contention of the trustee in bankruptcy that the payment of sums after knowledge of insolvency would be an unlawful preference under Section 60(a) of the Bankruptcy Act, and said:

> "On the contrary we hold that the date of the assignments governed the imposition of the liens on any sums due from Calvert. This is because the contracts, and not the moneys accruing under them, were the subjects of the assignments. * * * It has long been the New York law that such an assignment is good against a bona fide purchaser, even though the bona fide purchaser is the first to give notice to the obligor. * * * The same thing is true of an execution creditor or a trustee in bankruptcy." 129 F. 2d at 893.

POINT III

Since the law of Massachusetts applies, and no filing or other act of public recording was necessary prior to the enactment of the Massacuhsetts U.C.C. in 1958, the assignment of renewal commissions in 1938 created a perfected security interest therein on behalf of the Third National Bank.

The Trustee concedes at page 10 of his brief on appeal that Third National's security interest required no filing, refiling or recording prior to the effective date of the U.C.C. in New York, and that said security interest was

perfected prior to that time. However, the Trustee argues that the Third National's security interest "lapsed" by virtue of Third National's failure to file a continuation statement within three years after the enactment of the New York U.C.C. as is allegedly required thereunder by § 10-102(2).

The Trustee's argument is without merit for several reasons. In the first place, and as both Judge Frankel and Magistrate Goettel held, the substantive law of Massachusetts, not New York, applies with respect to the validity and effect of Third National's security interest. Hence, the provisions of the New York U.C.C. are inapplicable herein and Third National was not required to file any continuation statement within three years of the date of the enactment of the New York U.C.C.

Secondly, and as indicated hereinbefore, the Massachusetts U.C.C. did not become effective until 1958, twenty years after Third National had acquired a valid security interest which became perfected without the necessity of filing or other recording (as is conceded by the Trustee in his brief at page 10 and was held by the District Court). As the Court below pointed out, Massachusetts, unlike New York, did not choose to enact a special transition provision for Article 9 interests. "Instead, transactions validly entered prior to October 1, 1958, are deemed to be governed by pre-Code law" (A. 167a). Thus the Third National's perfected security interest created in 1938 required no filing or recording at any future date under the applicable Massachusetts pre-Code law.

However, even if New York law does apply herein (although both Judge Frankel and Magistrate Goettel have agreed that it does not), it is doubtful, to say the least, that the filing requirements of the U.C.C. apply. The Magistrate plainly held (A. 106a) that even if New York's law was applied for all purposes, its U.C.C. would not apply to the assignment of renewal commissions by virtue of the

exclusion by § 9-104(d) of "transfers of a claim for wages, salary or other compensation of an employee" from the operation of the New York U.C.C. generally. (See Point I, pages 10-11, *infra*).

In addition, and as the Magistrate pointed out (A. 104a), "it is far from clear that, even if New York's law controls, pursuant to U.C.C. § 9-103(1), New York's § 10-102(2) should be applicable to the assignment after its passage." As of the date that New York's U.C.C. became applicable the assignment had been completed some 25 years earlier (with notification given to the insurance company), the last advance on the loans had been made more than three years earlier, and the final note had matured the prior year (A. 105a). Thus the only act which occurred after New York's law became effective was that Simon continued payments on the note until his default in 1967, when the bank in Massachusetts looked to, and received for a period of time, direct payments of the renewal commissions from Mass. Mutual (A. 105a).

The Magistrate expressly said that it appeared doubtful whether this was a sufficient "transaction" to invoke New York's U.C.C., citing the following language of this Court in *In Re Appliance Packing and Warehouse Corp.*, 475 F. 2d 1011, at 1013 (Second Circuit 1973):

> "The 'extension of mortgage' agreement merely extended the time for payment of the note until July 1, 1967 and in our view did not alter Arista's and Appliance's liabilities on the instrument. The May 26, 1965 guarantee, the other mortgage and the $37,500 promissory note, were in our view separate transactions which did not modify or relate to the 1964 note. Therefore the guarantee did not give Appliance any greater rights against Arista for payments made on account of the note." (A. 105a)

And as the Magistrate also noted at page 23 of his Report (A. 104a-105a), citing the language of this Court in

In Re Appliance, supra,

> "While §§ 10-101 and 10-105 have been criticized as somewhat vague, we interpret § 10-102(2) to mean that the mere fact that these payments were to be made after the effective date of the Code, does not make the Code applicable to the 1964 note. See *James Talcott, Inc.* v. *Shulman,* 82 N.J. Super. 438, 198 A. 2d 98 (App. Div. 1964) cf. *Gem Corrugated Box Corp.*, 427 F. 2d 499, 502 N. 2 (2d Cir. 1970)."

Judge Frankel similarly recognized the anomaly in applying the transition provision of the New York U.C.C. § 10-102(2) to this pre-Code assignment of 1938. Emphasizing the fact that the assignment was intended to govern the rights and liabilities of the parties, Judge Frankel concluded that

> "here it was the 1938 agreement evidencing the intent of the parties to create the interest which is *the controlling transaction* with regard to the transition provision" (Emphasis added). (A. 167a)

In so concluding, the Court cited the case of *Empire Life Ins. Co. of America* v. *Valdak Corp.*, 468 F. 2d 330, 333 (5th Cir. 1972). There the Fifth Circuit held as "inescapable" the conclusion that a security agreement entered into ten months before the effective date of the Code was governed by the pre-Code state law "even as to those aspects of the transaction, including the foreclosure, that took place after the effective date of the Code." 468 F. 2d at 333. The following language of the Court is particularly significant herein:

> "In the overwhelming majority of cases where retroactivity of the Code has been in issue, it has been found that when a transaction was entered into prior to the effective date of the Code, the transaction would there-

after be governed for all purposes by the law in effect when the transaction was entered into." *Id.*

The New York State courts have also refused to give retroactive effect to the provisions of the U.C.C. Thus, a conditional sale made before the Code went into effect was held valid against creditors even though not recorded *and* even though the general assignment for the benefit of creditors was executed after September 27, 1964, the effective date of the Code in New York. *In re Merkel, Inc.*, 25 A.D. 2d 764, 269 N.Y.S.2d 190 (2d Dept. 1966). See also *Scovenna* v. *American Telephone & Telegraph Company*, 54 Misc. 2d 74, 281 N.Y.S. 2d 854 (1967).

Even assuming *arguendo*, however, that New York law applies and that this state's U.C.C. also applies, it is clear nonetheless that the Third National perfected its security interest by filing U.C.C. financing statements in 1970. The Trustee apparently fails to understand (or deliberately overlooks) the distinction between a continuation statement and a financing statement, and the effect and purpose of filing these statements. A perfected security interest which loses its perfected status, whether as a result of the failure to file a continuation statement or as a result of some other defect, is not rendered void or invalid merely because of the "lapsing" of the same. In other words, and as this Court has held, a perfected security interest which lapses is not void or invalid, and may again be perfected by filing. See *Lynch* v. *County Trust Company*, 404 F. 2d 1149 (2d Cir. 1968).

This Court in the *Lynch* case was presented with the same argument by the trustee in bankruptcy as is made by the Trustee herein with the single difference that Section 10-102(3)(b) was involved there. The Trustee in *Lynch* also urged that the security interest was null and void vis-a-vis his hypothetical judicial lien arising out of Section 70(e) of the Bankruptcy Act. The secured creditor had failed to file the security interest in the proper

filing office "within 10 days after the making of the conditional sale", and this Court correctly rejected the Trustee's argument that the security interest thereby became void and could not be perfected thereafter, stating that

> "The 10 day exception of Section 65 [of the N.Y. Personal Property Law] merely protects the holder of the security interest who files within the 10 day period even as to a purchaser or creditor of the buyer 'who, without notice of such a provision (reserving title in the seller) purchases the goods or acquires by attachment or levy a lien upon them' " 404 F. 2d at 1151.

Clearly, the Third National's security interest was not rendered null and void as against the Trustee by virtue of Third National's failure to file a continuation statement. Even if the same lost its perfected status from and after 1967, it was perfected once again upon the filing of the financing statements in 1970. At the most, it might be argued (although it is submitted that New York law and its U.C.C. is obviously inapplicable herein) that Third National's security interest is junior to the only other secured creditor (Stuart) who perfected her security within such period of "lapse" between September 27, 1967 and February of 1970.

Otherwise a security interest duly acquired and perfected would be rendered invalid merely because it had not been "continued" for a certain period. This is not the law. The U.C.C. provision (§ 9-403) dealing with the filing of continuation statements in order to continue the perfection of a security interest does not state or otherwise indicate that the failure to so file renders void or invalid otherwise enforceable security interests. Moreover, it goes without saying that the security interest continues between the debtor and the creditor whether the same is ever perfected or, after perfection, is allowed to lapse.

Furthermore, continuation statements are, by their very nature, substance and form applicable solely where a U.C.C. statement has been filed and not renewed in accordance with Section 9-403. They are inapplicable where, as here, there has been no prior filing, in which event a Section 9-402 form is required, as was admittedly filed herein (A. 81a).

The Trustee apparently concedes, significantly, that the Third National Bank fiied sufficient financing statements which, even if not continuation statements, perfect the security interest in the event of any lapsing of the same from and after 1967 as argued by the Trustee. Indeed, it could hardly be argued that the Third National failed to perfect its security interest upon the filing of the respective financing statements. The agreement, which Simon executed, reasonably indentifies what is described, U.C.C. § 9-110, and the three requirements for attachment are fulfilled in that a security agreement was in fact executed (the 1938 assignment), value was advanced (the $75,000 initial loan) and the debtor retained rights in the collateral (the right to enjoy the commissions until default in his loan payments).

By filing the U.C.C. financing statements in February and March of 1970 (more than four months before the date of bankruptcy), Third National only meant to leave no doubt that it had perfected its security interest theretofore acquired (and perfected) by the 1938 assignment against all third parties, including the trustee in bankruptcy. As the Trustee becomes a lien creditor without knowledge of an unperfected security interest under U.C.C. 9-301 only "from the date of the filing of the petition", and the Trustee's rights and powers under § 70(c) of the Bankruptcy Act (relied upon by the Trustee at pages 13 and 14 of his brief on appeal) arise only "as of the date of bankruptcy", the Trustee is obviously not a prior lien creditor as regards Third National.

POINT IV

The renewal commissions and all future sums neither vest in the trustee in bankruptcy nor are they subject to a prior lien claim of the trustee.

The Third National does not dispute that a trustee in bankruptcy *as of the date of the filing of the petition* becomes vested by operation of law with the title of the bankrupt and the rights and powers of a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings pursuant to § 70 of the Bankruptcy Act. This does not mean, however, as the Trustee contends at Point V of his brief, that the Trustee has a prior lien or title to the security interest in renewal commissions assigned to and held by the Third National.

Since the assignment made in 1938 was valid (and was perfected when made, with no filing or recording needed), Simon had no interest in or right to the renewal commissions after defaulting in his loan payments in 1967, and the trustee in bankruptcy, as successor in interest to Simon's property rights, similarly has no claim to the fund. Section 70(a) of the Bankruptcy Act only vests in the Trustee title to non-exempt property rights to which the bankrupt had title "as of the date of bankruptcy." The Trustee's right to future renewal commissions can rise no higher or be greater than that of the bankrupt's at the date of bankruptcy. *Mutual Trust Life Insurance Co.* v. *Wemyss, supra.* Thus, Simon's assigning of his title to the renewal commissions and subsequent default in payments precludes the Trustee from now asserting title to the same:

> "Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable, mortgages, liens or simply priority of rights, are of course not a part of the bankrupt's property and do not vest in the trustee. *The Bankruptcy Act simply does not authorize a trustee to*

> *distribute other people's property among a bankrupt's creditors.*" 309 F. Supp. 1231. (Emphasis added.)

The Trustee therefore has no prior lien or claim to the commissions, since the Trustee's rights under § 70(c) of the Bankruptcy Act as a hypothetical lien creditor arise only "as of the date of bankruptcy." See *Lewis* v. *Manufacturers Nat. Bank,* 364 U.S. 603 (1961). Since Third National's security interest in Simon's renewal commissions was perfected simultaneously with the assignment thereof in 1938 (or, assuming *arguendo* the validity of some of the Trustee's arguments, in 1970 upon the filing of the financing statements) and since the Trustee can avoid only those security interests which remain unperfected "as of the date of bankruptcy", the Trustee's claim to the renewal commissions is obviously subordinate, and not prior, to that of Third National's.

The findings and conclusions of the Magistrate are clear on this point. Stating the well settled rule that a valid lien on property obtained more than four months before bankruptcy (as is the case herein) is unaffected by a bankruptcy discharge, the Magistrate concluded that the assignment of the renewal commissions to the Third National created

> "an equitable lien which attached to the commissions when the premiums were paid, and the lien relates back to the date of assignment. *Bishop* v. *Commissioner of Internal Revenue, supra; Caldwell* v. *Armstrong,* 342 F.2d 485 (10th Cir. 1965); *Williams* v. *Stockman National Life Ins. Co.,* 509 P.2d 1276 (Col. 1973)." (A. 115a).

In other words, and as the Magistrate expressly held, the Third National's lien "survived the petition in bankruptcy and vested the renewal commissions due when the renewal premiums were paid with a relation back to the time prior to the bankruptcy when the policies were sold" (A. 115a).

The difficulty with the Trustee's § 70(e) argument is that U.C.C. Section 9-301(1)(b) does not make the Third National Bank's filings in February and March of 1970 "fraudulent as against or voidable for any other reason" by Stuart or any other creditor within the meaning of Section 70(e) of the Bankruptcy Act. All that Section 9-301(1)(b) does with respect to such filings is make them "subordinate" to the rights of a prior lien creditor but that does not mean that they are necessarily fraudulent as against or voidable for any other reason by any other creditor.

Stated in another way, such Section of the U.C.C. merely determines priority; it does not decree that a subsequent lien may be deemed fraudulent or voidable by a prior lien creditor.

In essence, the Trustee predicates his whole argument under U.C.C. Section 9-301(1)(b) and Section 70(e) on the basis of the opinion in *Moore* v. *Bay,* 284 U.S. 4, which involved Section 344 of the Civil Code of California. That Section, however, provided that a chattel mortgage "will be conclusively presumed to be *fraudulent and void* as against the existing creditor . . . unless at least seven days before the consummation of such . . . mortgage, the . . . mortgagor . . . shall record in the office of the county recorder . . . a notice of said intended . . . mortgage." (Emphasis added). It is clear from the wording of said statute that a chattel mortgage that did not comply therewith would be "conclusively presumed to be fraudulent and void as against the existing creditors" and hence that is the reason for the decision by the United States Supreme Court in that case. Such, however, is not the case here where Section 9-301(1)(b) of the New York U.C.C. does not contain any such language and hence does not make a subsequently perfected security interest fraudulent or void as against a prior lien creditor such as, argues the Trustee, Stuart. It merely subordinates such creditor. Hence Sec-

tion 70(e) of the Bankruptcy Act has no application with respect thereto.

The other authorities cited by the Trustee for the proposition that Section 70(e) grants the Trustee superior rights to those of Third National are, like the case of *Moore* v. *Bay,* similarly unavailing. In *Deane* v. *Fidelity Corporation of America,* 82 F.Supp. 710 (W.D. Mich. 1949), for example, the chattel mortgage recorded three days after its execution by the bankrupt was held voided by the trustee in bankruptcy under § 70(e) by reason of the specific Michigan state statute which, unlike U.C.C. § 9-301 or Personal Property Law § 46 *et seq.,* renders such mortgages (when not accompanied by an immediate delivery and followed by an actual and continued change of possession of the mortgaged goods) "absolutely void" unless the mortgage is duly filed. The identical Michigan statute served as the basis for the decisions in *In re Valley City Furniture Company,* 161 F.Supp. 39 (W.D. Mich. 1958) and *In re Truscott Boat & Dock Co.,* 92 F.Supp. 430 (W.D. Mich. 1950), cited at p. 20 of the Trustee's brief.

What the Trustee apparently fails to comprehend is that his rights under § 70(e) are only those of an *unsecured* creditor, and that as such he is incapable of avoiding the Third National's secured interest absent either the existence of an applicable state statute (none exists) which renders the same void or voidable by an actual creditor with a prior and provable claim or proof of fraud in the conveyance (none has been shown). As is stated at 4A *Collier on Bankruptcy* (14th ed.) ¶ 70.81 [10], p. 938:

> "It must be remembered that the security interest is perfectly valid as between the parties if there is in existence a security agreement signed by the debtor and containing a description of the property or if the secured party obtains possession of the collateral as if by a pledge. * * * that agreement is effective as between the parties whether or not the security interest

granted thereby has been perfected by the secured creditor. Accordingly, the trustee would not achieve any rights of avoidance as the representative of the bankrupt. His only right under § 70e would be dependent upon the right of an unsecured creditor, if any."

As is indicated at 4A *Collier*, p. 939, the Trustee gains the rights of unsecured creditors *only* "and in connection with an unperfected security interest under the Uniform Commercial Code, no rights exist". The Trustee's only rights would exist under § 70(c) as a hypothetical lien creditor "as of the date of bankruptcy". The following discussion in 4A *Collier*, at pp. 939-940, clearly shows that the Trustee does not have the broad power of avoidance which he seeks to assert under § 70(e):

"If there is in existence a judicial lien creditor who obtained his lien before the security interest was perfected and without knowledge of it, he, the lien creditor may subordinate the security interest for *his own benefit*, which benefit may or may not pass to the trustee under other sections of the Bankruptcy Act, but not under § 70e. *At the date of bankruptcy, that lien creditor is a secured creditor in his own right and as with other secured creditors would be entitled to full satisfaction from the collateral subject to his lien before any distribution is made in bankruptcy.* If the judicial lien, however, is voidable at the instance of the trustee under either § 67a or § 60 because obtained within four months of bankruptcy when the debtor was insolvent, the trustee under either of those sections may preserve the lien for the benefit of the estate. Under these conditions, the trustee could upset the security interest to the extent of the value of the judicial lien but if the collateral brought in more than the judgment, the secured creditor would be entitled to the excess up to the amount of the indebtedness secured and owing to him.

"Thus, as a general statement it may be said that the trustee's rights under § 70e are those of *an unsecured creditor* and not those of a secured creditor by whatever form the lien takes. And an unsecured creditor may not invalidate a security interest that falls within Article 9 of the Uniform Commercial Code even though it may be unperfected thereunder at the date of bankruptcy or for some time before bankruptcy." (Emphasis added).

Certainly, no doubt can remain that the Trustee has no powers of avoidance under § 70(e) in his capacity thereunder as an unsecured creditor only as regards the secured interest of Third National in the renewal commissions pursuant to the 1938 assignment. The following statement which appears in 4A *Collier,* ¶ 70.87A, p. 1013, illustrates further the crucial fallacy in the Trustee's strained argument and interpretation of his asserted § 70(e) powers:

"Thus if the security interest is voidable under the U.C.C. by a judicial lien creditor for lack of filing or other form of perfection required by the U.C.C., the trustee may not avoid the transaction under § 70e(1)."

The Trustee's arguments under § 70(e) are misplaced for a further reason. Since § 70(e) confers upon the Trustee no greater rights of avoidance than the creditor himself would have if he were asserting invalidity on his own behalf, the Trustee is estopped from asserting any rights under § 70(e) where (as here), the creditor whose rights the Trustee seeks to assert has conceded the validity of the security interest sought to be avoided. See 4A *Collier,* ¶ 70.90[2], pp. 1037-1038. As was stated in the case of *Smith* v. *Litton,* 167 Va. 263, 188 S.E. 214, 32 A.B.R. N.S. 384:

"When a party agrees to the entry of a void judgment, with full knowledge of its invalidity, and ac-

> cepts the benefits under it, he will not be permitted later to show its invalidity. * * * Parties may lawfully agree to confer a void judgment. It may be accepted as valid by their consent. * * *"
>
> "In *Remington on Bankruptcy,* 4th ed. vol. 4, p. 361, § 1543, it is stated that where all of the creditors are estopped to avoid an alleged fraudulent transfer the trustee in bankruptcy is likewise estopped. *Durrett* v. *Harris,* 148 Ark. 4, 228 S.W. 386, 388, 46 A.B.R. 499."

Thus, since the only creditor (Stuart) whose alleged rights the Trustee seeks to assert against the Third National under § 70(e) has conceded that Third National has a superior claim in the renewal commissions (A. 107a), the Trustee is estopped from asserting any such rights which the judgment creditor, Stuart, may have had in the renewal commissions.

Is should be noted that the Trustee attempts to attack this stipulation for the first time upon this appeal (the same is not challenged in the pleadings of the Trustee) and that the Magistrate stated that the result of the stipulation "appears correct in any event" (A. 107a).

POINT V

Even if the 1938 assignment of renewal commissions could be deemed a transfer "made within one year of bankruptcy", the evidence shows that the assignment was made for a "fair consideration" and with no fraudulent intent, while Simon was not insolvent, and hence violates none of the fraudulent conveyance provisions of the Bankruptcy Act or New York's Debtor and Creditor Law.

The Magistrate (and Judge Frankel by implication) left undecided as "unnecessary" consideration as to whether the Bank's filings of U.C.C. financial statements constituted

a fraud upon the creditors under Section 70(e) of the Bankruptcy Act as argued by the Trustee (A. 106a-107a).

With the one exception of § 67d(2)(d), which requires a showing of "actual intent as distinguished from intent prescribed in law" to hinder, delay or defraud creditors, the provisions of the Bankruptcy Act relied upon by the Trustee for his argument that the assignment herein constitutes a fraudulent conveyance requires proof that the transfer occurred within one year of bankruptcy and lacked "fair consideration".*

Since the assignment to Third National was perfected upon execution and acceptance in 1938, the transfer was perfected, and hence "made" for the purposes of § 67d of the Bankruptcy Act, in 1938, and the Bank's filing of U.C.C. financial statements in 1970 out of an excess of caution are superfluous and irrelevant. Accordingly, the Trustee's allegations of a fraudulent conveyance require no further consideration or deliberation by this Court since the prerequisite to the Bankruptcy Act fraudulent conveyance provisions of a transfer within one year of bankruptcy is absent.

In this connection, it is significant that Judge Frankel concluded in his consideration of the treatment of the Bank's advances following the adoption of the U.C.C. in Massachusetts, that

> "here it was the 1938 agreement evidencing the intent of the parties to create the interest which is the

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* The Trustee was of course also required (and failed) to prove the existence of at least one other element to sustain each allegation. For example, Simon must have been insolvent or thereby rendered himself insolvent when he "made" the assignment under subsection (2)(a) of § 67(d). Similarly, it is a necessary element of subsection (2)(b) that the business property remaining in Simon's hands after "the transfer" amounted to unreasonably small capital, and of subsection (2)(c) that the transfer was made by Simon with the intent to incur debts beyond his ability to pay as they matured.

controlling transaction with regard to the transition provision." (A. 167a)

In any event, and in addition to the fact that the transfer was "made" in 1938, it is clear that the Trustee has failed to offer any proof which might show that the assignment herein was made for anything but "fair consideration", another requirement in the Trustee's proof to show a fraudulent conveyance.* Indeed, the evidence is to the contrary.

The 1938 assignment by its very terms provides that "said bank is hereby authorized to collect said commissions *until* the whole of the indebtedness as aforesaid shall have been paid, *whereupon, this assignment shall become void*" (A. 25a; Third National's Exh. A). Third National's security interest in the renewal commissions extends only to the amount of Simon's indebtedness. In addition, no penalty charges are provided for. The consideration is obviously "a fair equivalent" and "not disproportionately small", to use the very language of Bankruptcy Act § 67d(1)(e).

The loan given by the Bank in consideration for the 1938 assignment was a standard time loan with a six month term. Mrs. Joan Ackerman, a loan officer of the Bank, testified upon the hearing before the Special Master that the initial loan for $75,000 was simply "renewed" at the end of the six month time period, with Simon signing a new piece of paper for another stated period of time (A. 143a-146a). Successive time notes were thereafter executed by Simon from 1938 through 1963, whether further advances were in fact made or not. Mr. Simon simply made periodic payments as he was able to throughout the years on the outstanding balance of the 1938 loan until such time as his

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* The burden of proving a fraudulent conveyance is always on the Trustee. *Dean* v. *Davis*, 242 U.S. 438 (1916); *Van Iderstine* v. *Nat. Discount Co.*, 227 U.S. 575 (1913).

accounts were restrained in 1968 (A. 134a). In fact, the evidence shows that Mr. Simon made repayments from and after July 17, 1963, to and including March 29, 1967, the date when the Bank demanded payment from Mass. Mutual of the renewal commissions due it pursuant to the 1938 assignment, of approximately $149,000 (Third National's Exhs. I, J, and L).

Similarly, the "fair consideration" given by the Bank in the way of loans and advances from 1938 to and including December 22, 1960 (the date of the last advance to Simon on the basis of the original note executed in 1938), in exchange for Simon's assignment to the Bank of his right, title and interest to renewal commissions is not rendered "unfair" or in any way fraudulent by the mere fact that no new or additional consideration was given or received in 1970 when (assuming *arguendo* the U.C.C. is applicable), the antecedent debt was "secured" by the filing of the respective U.C.C. financing statements. This is for the reason that the Bankruptcy Act expressly includes the securing of an antecedent debt as "fair consideration":

> "consideration given for the property or obligation of a debtor is 'fair' (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred *or an antecedent debt is satisfied,* or (2) when such property or obligation is received in good faith to secure a present advance *or antecedent debt* in an amount not disproportionately small as compared with the value of the property or obligation obtained." Section 67d(1)(e). (Emphasis added.)

The record also shows indisputably that Simon had no intent to confer, and the Bank had no intent to receive, a fraudulent conveyance. The initial loan of $75,000 in 1938 and all loans extended thereafter were given by Third National (and received by Simon) with no thought of defeating other creditors or favoring friends, as is required

in order for a transfer to amount to a fraudulent conveyance motivated by bad faith or fraudulent intent. See *Mayo* v. *Pioneer Bank & Trust Co.*, 168 F. Supp. 503 (W.D. La. 1958), affirmed in part and reversed in part, 270 F. 2d 823 (5th Cir. 1959), cert. denied 362 U.S. 962 (1960); *Matter of Messenger*, 32 F. Supp. 490 (E.D. Pa. 1940). Mr. Simon testified on direct examination that the only discussion he had ever had with a Bank officer in 1968 with respect to his financial condition may have been to telephone the Bank "to verify the amount of the balance I owed *but that's about all*" (A. 133a-134a). In addition, Simon testified that he consulted his attorneys before executing the U.C.C. financing forms in all instances. On one such occasion (A. 135a; R. 81-82), he asked his attorney Mr. Arutt whether he should sign a U.C.C. form, to which Mr. Arutt inquired:—"Lawrence, do you owe the money?" Simon replied that yes, he did owe the money, to which Mr. Arutt responded, "Well, then why shouldn't you sign if you owe the money?" Simon then signed the U.C.C. forms in the presence of his attorney at his attorney's desk and mailed them back. (See also A. 138a-139a.) Mr. Simon also testified that he consulted his attorney before executing the affidavit confessing judgment on May 16, 1970 (A. 136a-138a).

It is difficult indeed from Mr. Simon's testimony, not to mention the lack of any other evidence to the contrary, to imagine how the 1938 assignment constitutes a fraudulent conveyance. This is especially so when it is considered that Simon had no thought of bankruptcy when he executed the U.C.C. forms in February and March of 1970. Simon testified that he was surprised at the mention of any bankruptcy proceeding within the next four months, and further that "I didn't know what he had in mind" [i.e., concerning any bankruptcy proceeding] (A. 135a). Mr. Simon reiterated his surprise again at Mr. Platt's alleged remark regarding the filing of a petition in bankruptcy during the next four months and answered that "The fact is I had no such thought in mind at all" (A. 139a).

In sum, Mr. Simon's situation from and after the service of the restraining notices upon Mass. Mutual in 1967 to the filing of the voluntary bankruptcy petition in 1970 was a period in which Mr. Simon may have attempted to work things out with his various creditors but a period in which he had absolutely no fraudulent intent to defeat certain creditors or favor others. Even if it might be argued (although there is nothing to support it) that the Third National obtained during this period a preference by the filing of the U.C.C. financing statements in 1970, it is important to note that a mere preference, however, is not voidable as a fraudulent conveyance. *Coder* v. *Arts,* 213 U.S. 223 (1909); *Irving Trust Co.* v. *Chase National Bank,* 65 F. 2d 409 (2d Cir. 1935); *Dean* v. *Davis, supra; Van Iderstine* v. *Nat. Discount Co., supra.*

This rule of *Coder* v. *Arts,* i.e., that a mere preference is not voidable as a fraudulent conveyance, is based upon the fact that while every preferential transfer at least incidentally hinders or delays the non-preferred creditors to some extent, the securing or paying of a debt in good faith without any design injurious to creditors beyond that implied in giving a preference was not deemed to be a fraudulent conveyance under the principles of the common law and the Statute of 13 Elizabeth. See 4 *Collier* at 614.

Furthermore, a transferee who is a "bona fide purchaser, lienor, or obligee for a present fair equivalent value" under Section 67(d)(6) does not violate this section of the Bankruptcy Act and is protected to the extent of consideration given. See 4 *Collier* at 598 (N. 58). Many courts, including this Court, have included transferees who secure antecedent debts as bona fide purchasers, lienors, or obligees within the meaning of Section 67(d)(6). See *Coder* v. *Arts, supra; Mayo, supra; Wright* v. *Sampter,* 152 F. 196 (S.D.N.Y. 1907); *Epstein* v. *Goldstein,* 107 F. 2d 755 (2d Cir. 1939).

The Trustee's allegations of a fraudulent conveyance based upon New York's Debtor and Creditor Law are

similarly unavailing in view of the evidence. Although a transfer may be fraudulent under New York law even though made more than one year before bankruptcy, it must first constitute a "conveyance" within the meaning of the Debtor and Creditor Law—which requires a *voluntary* act by the debtor. *Merriam* v. *Wimpfheimer*, 25 F. Supp. 405 (S.D.N.Y. 1938). No "conveyance" is effected where the bankrupt or debtor takes no action or does nothing in the transfer. *Merriam, supra*, at 407.

Here the only voluntary acts undertaken by Simon were the execution of the 1932 assignment, the receipt of loans thereafter given on the basis of such security, and the execution of the U.C.C. financing statements filed in March 1970. The first two voluntary acts (execution of the 1938 assignment and receipt of the loans) were done while Simon was undeniably solvent and at times when he could not by any stretch of the imagination have had any intent to hinder, delay or defraud creditors. As to the signing of the U.C.C. forms, this was an unnecessary and superfluous act in that the transfer was simultaneously perfected upon the making of the assignment in 1938, or, at the latest, through the filing of the unsigned financing statements in February 1970. See U.C.C. § 9-402(2)(b), providing that the filing of an unsigned financing statement is sufficient to perfect a security interest in proceeds under § 9-306 where the security interest in the original collateral was perfected. As Third National perfected its security interest in New York by filing the unsigned financing statements in February 1970 (an act with respect to which no voluntary action on the part of Simon was involved), no "conveyance" took place within the meaning of the Debtor and Creditor Law and the Trustee's claims of a fraudulent conveyance are lacking in merit.

When all the relevant facts are considered—the nature of the 1938 loan and assignment, Simon's making of partial repayments to the Bank over the course of many years, his admission to his attorney of his debt to the Bank when

signing the U.C.C. forms, his constant seeking of legal advice, and the absence of any thought of bankruptcy in February of 1970—the contention that Simon even granted a preference, much less a voidable fraudulent conveyance, appears meritless if not plainly frivolous.

Moreover, the Trustee has failed to prove that Simon was insolvent when he made the assignment. No evidence was offered with respect to Simon's financial condition in 1938, when the transfer of his right to future renewal commissions to the Bank occurred. Even assuming that the "transfer" could be deemed "made" for the purposes of the Bankruptcy Act in 1970, when the U.C.C. financing forms were filed, no proof was offered of Simon's financial situation as to that time. Indeed, the voluntary petition in bankruptcy filed by Simon on July 21, 1970 shows on a schedule entitled "Summary of Debts and Assets" that Simon had assets of $1,500,000 and liabilities of only $1,189,815 (Trustee's Exh. A; A. 133aa).

The Trustee attempted unsuccessfully to contradict this schedule through the testimony of Dermot Foley, but Mr. Foley could testify only as to the assets of the Pension Corporation of America on November 5, 1971 (some fifteen and a half months after the petition date and over nineteen months after the filing dates) (R. 47-49). Foley was incompetent to, and never did, testify as to the Corporation's assets in February or July of 1970 and the only evidence as to Simon's condition in February of 1970 was from Simon who expressed surprise at any thought that he might be insolvent (A. 135a, 139a). Insolvency in February or March of 1970 has not been established and, if anything, was affirmatively disproved.

POINT VI

The trustee in bankruptcy's claims with respect to a fraudulent conveyance under the Bankruptcy Act, having been instituted more than two years subsequent to the date of adjudication of bankruptcy, are barred by the Statute of Limitations.

Section 11(e) of the Bankruptcy Act provides in pertinent part that:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

Although Simon was adjudicated a bankrupt on July 21, 1970, the date that he filed a voluntary petition in bankruptcy in the Southern District of New York, the trustee in bankruptcy did not assert his claims under the Bankruptcy Act against Third National with respect to a fraudulent conveyance until August 2, 1972, at which time the Trustee's amended answer was served upon the attorneys for Third National (A. 59a). As the two-year period is the maximum time allowed under Section 11(e) of the Bankruptcy Act, and the Trustee herein failed to institute proceedings asserting his claims of a fraudulent conveyance under the Bankruptcy Act against Third National within two years of the date of adjudication of the bankrupt, Simon, the Trustee's claims and arguments as to a fraudulent conveyance against Third National herein are untimely and should be dismissed.

It is indisputable that the Trustee has not to date instituted any proceedings in the form of a plenary action asserting claims of a fraudulent conveyance against Third National.

Accordingly, all of the Trustee's defenses predicated on a fraudulent transfer under the Bankruptcy Act to Third National (Defense Nos.: Six, Seven, Eight and Nine) are time barred and should be dismissed.

POINT VII

The $8,400 loan of December, 1967 should not be treated differently as an unsecured loan.

After holding the second hearing, the Magistrate held that because Third National's new loan to Simon in December, 1967 (T. 203, 206) was made after the U.C.C. went into effect in both New York and Massachusetts and at a time when Simon was no longer employed by Mass. Mutual, such new loan was an unsecured loan (A. 128a-129a).

In addition to the fact that this new loan was also secured by the renewal commissions of Simon under the 1938 assignment (T. 153), this finding of the Special Master completely overlooks or ignores stipulated facts 25 and 26 (A. 81a) that on February 25, 1970, Third National filed in New York Uniform Commercial Code forms (U.C.C.-1) unsigned by Simon and on March 11th and March 16, 1970, Third National filed such forms in New York signed by Simon and further that on March 12th and March 13, 1970, Third National filed signed forms in the appropriate offices in Massachusetts (see also A. 159a).

These filings of U.C.C. financing statements in the early part of 1970 made the December 1967 new loan to Simon a secured loan. Since all such filings were more than four months before the date of filing by Simon of his petition in bankruptcy, they could not be set aside by the trustee in bankruptcy as a preference under Section 60 of the Bankruptcy Act.

Accordingly, even if the new loan of $8,400 was not also perfected by the 1938 assignment, the same was perfected

in February or March of 1970 and four months before the date of bankruptcy when Third National filed U.C.C. financing statements in Massachusetts and New York.

Conclusion

The final judgment of the District Court awarding the defendant Third National Bank of Hampden County all of the renewal commissions on deposit and held and to be held in the future by the plaintiff herein should be affirmed. The decision of the District Court denying the Third National Bank's claim to the balance remaining on the $8,400 new loan of December 6, 1967 should be reversed to that extent.

Respectfully submitted,

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Of Counsel

United States Court of Appeals
FOR THE SECOND CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

against

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JENNINGS, IRVING GEIST, KENNETH DEMBSKI, ROYAL S. MARKS, SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR., ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT, JR.,

Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH, and HELGA RUTH JENNINGS,

Defendants-Appellees,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of Lawrence E. Simon, Bankrupt,

Intervenor-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

CHARLES Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 12 STATE ST. VALLEY STREAM N.Y.

That on DEC 19, 1974, he served 2 copies of Brief + Appendix on

See attached

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Esposito

Sworn to before me this
19th day of DECEMBER, 1974

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-0934220
Qualified in Nassau County
Commission Expires March 30, 1975

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